IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 153.

SAINT LO CONSTRUCTION COMPANY, INC., A Corporation,
Petitioner,

v.

LAWRENCE KOENIGSBERGER, ET AL., *Respondents.*

PETITIONER'S REPLY BRIEF.

A. The Statement of the Case Contained in Petition for Writ of Certiorari is Accurate for All Proper Puposes of These Proceedings.

At Page 2 of their brief, respondents state that the petitioner's Statement of the Case ". . . is replete with inaccurate statements concerning the proceedings below . . .". While the petitioner acknowledges that a respondent may find it necessary to supplement a given Statement of the Case in order to better support a selected legal argument, it nevertheless contends that it has never been the practice of this tribunal to receive reckless accusations impugning the character of members of this bar, merely because an

adversary prefers to be relieved of the slight effort incident to supplementing a Statement. Petitioner quite earnestly avers that its Statement wholly conforms with the factual statements in the opinions of the Court of Appeals. The very fact that the respondents have failed to specify where *any* inaccuracies appear would seem to indicate inexcusable recklessness. It is true petitioner did not include in the Statement several matters which relate to local features of the controversy. Strange as it may seem, when these local features were fully described in a brief filed in the Court of Appeals, respondents contended as follows: "The statement of facts presented in the brief . . . is based . . . largely on matters immaterial to this appeal . . .". In other words, the respondents there contended that the sole question in the Court of Appeals was res judicata, protesting that appellant's brief filed went far afield. Now, respondents find it convenient to supplement the Statement with local features to neutralize the res judicata aspect—contending that the case "involves merely the application of local law to a restrictive covenant affecting real estate in the District of Columbia." (Respondents' Brief, Page 9.)

B. Rule 52(a), Federal Rules of Civil Procedure, is Inextricably Involved in These Proceedings and in no Wise Imaginary.

The respondents, at Page 11, Respondents' Brief, argue that findings of fact under Rule 52(a), Federal Rules of Civil Procedure, are "clearly not essential to the conclusiveness of a judgment . . .". Several decisions of the circuit courts are mentioned by the respondents in support of their contention, but all of these cases, admittedly, turn on the point that the particular issues were sharp, single, and clear. By inference, if the issues were otherwise, respondents admit that findings of fact *are essential.* Such being the case, respondents' argument must be taken

as one in support of petitioner's application for certiorari, for in the prior Zarin proceeding, the issues *were not* sharp, single, or clear. In fact, the issues were so involved that District Judge Schweinhaut, at pre-trial, refused to estimate them in the absence of findings while Dissenting Circuit Judge Edgerton specifically ruled that they were susceptible of an interpretation entirely distinct from the views of the majority of the Court of Appeals. In other words, five jurists have examined these issues; three have agreed, and two have disagreed. Under respondents' theory, the prior judgment would have been reversed on direct appeal for failure to comply with Rule 52(a), *Smith* v. *Dental Products Co., infra.* Therefore compliance with Rule 52(a) was necessary to give validity to the general judgment of dismissal entered against petitioner's predecessor in title.

The respondents cannot therefore contend, as they do, that petitioner's arguments in that respect are "wholly imaginary". Surely, it is hoped that this same view was not deemed *imaginary* when Messrs. Koenigsberger, Fischer, and Panzer, as editors thereof, selected the following article for publication in Volume 2, Pages 733, 734, Federal Rules Service (Callaghan & Company):

> "This duty of making special findings of fact is mandatory, not discretionary. This follows from the terms of Rule 52 that special findings shall be made in *all* actions . . . tried without a jury . . . However, the failure to make a *particular* finding of fact ordinarily should not make the judgment *defective.* . . . Under the former federal practice if an action at law was tried without a jury, it was left to the discretion of the court whether the findings of fact should be general or special. . . ."

Respondents' views are repeated in Volume 5, Federal Rules Service, Page 840, where it is said ". . . fact finding is a serious responsibility and one which cannot adequately be discharged by mechanically adopting findings prepared

by counsel . . .''; and, once again, ''. . . The purpose of findings is to insure decision according to the evidence and the law and to *apprise the parties* . . . of the basis of the decision . . . .''. Volume 4, Page 936.

Petitioner nevertheless contends that fair compliance with Rule 52(a) is essential even in those cases were the issues are *clear*. It, therefore, urges that *Gill v. Gill*, 147 Fed. (2) 154, 79 U. S. App. D. C. 357, is in sharp conflict with the other circuits. *Smith* v. *Dental Products Co.*, 168 Fed. (2) 516, (CCA Ill.), *Brown* v. *Quinlan, Inc.*, 138 Fed. (2d) 228, (CCA Ill.). *Bowles* v. *Russell Packing Co.*, 140 Fed. (2) 354, (CCA Ill.), *Paramount Pest Control Service* v. *Brewer*, 170 Fed. (2) 553, (CCA Ore.). In fact, a sharp conflict exists within the judicial panels of the United States Court of Appeals of the District of Columbia Circuit. *National Savings & Trust Company* v. *Shutack*, 139 Fed. (2) 371, 78 U. S. App. D. C. 232; *Rainey* v. *Rainey*, 131 Fed. (2) 349, 76 U. S. App. D. C. 341; *Campbell* v. *Campbell* 170 Fed. (2) 809, —— U. S. App. D. C. ——, 11 Federal Rules Service, 785, where the court said: ''. . . the requirement that courts shall make findings of fact is far from a technicality. . .''.

In *Smith* v. *Dental Products Co., supra,* it was held that a general finding was not fair compliance with Rule 52(a), and the defect *was fatal*—not merely reversible error, citing circuit court decisions in support, thereof. Doubtless, the mandatory provisions set forth in Rule 52(a) do not differ in substantive features from those in the Tucker Act, 28 USCA, Section 764. In *Girard Trust Co.* v. *United States*, 149 Fed. (2) 872, (CCA—Pa.), the court held that findings of fact under the Tucker Act were mandatory, comparing these terms with Rule 52(a), Federal Rules of Civil Procedure, saying:

> ''. . . The absence of such findings in the case at bar defeats the judgment. . . .''.

Petitioner is not attempting to inject into these proceedings on certiorari a question which was not urged repeatedly in the courts below, nor, as respondents state, attempting to give flavor to these proceedings by injecting a point which had not been urged from the very beginning (R. 39, 58). In fact, the point of fair compliance with Rule 52(a) was injected into the case by the respondents, themselves, when the general finding in the former Zarin proceeding was first urged by them to deprive petitioner of procedural due process of law.

With this point inextricably involved in the plea of res judicata, it presents a matter of timely interest to both the bench, bar, and the Advisory Committee on Rules of Civil Procedure. Particularly, it is of interest to determine the extent to which this Court desires to apply the language contained in Rule 52(a), Federal Rules of Civil Procedure. It is quite doubtful if in the near future, the same nicety will develop for decision by our highest tribunal. Moreover, the controversy, f reviewed, will settle a number of rather vexing questions, namely:

(a) Are findings of facts and conclusions of law mandatory under the provisions of Rule 52(a), Federal Rules of Civil Procedure?

(b) Or, are such findings an informality in certain instances and mandatory in others, without definition of shadowy boundaries?

(c) Is a failure to make such findings a matter to be corrected only upon appeal, or may strangers in fact to the judgment demand the same degree of apprisement contemplated for an appellate body?

In discussing the fatal defect in the prior judgment which resulted from a failure to comply with Rule 52(a), petitioner does not recede from the position which is assumed in its Brief in Support of Certiorari, namely, that even before the adoption of Rule 52(a), Federal Rules of Civil Procedure, the prior Zarin judgment was not such an ad-

judication which would warrant a denial of the right to a full defense, *Hansberry* v. *Lee*, 311 U. S. 115. In other words, petitioner adheres to arguments set forth in its brief that the prior litigation did not determine any of the issues which were subsequently before the District Court in these proceedings. It does, however, say that failure to comply with Rule 52(a), Federal Rules of Civil Procedure, merely emphasizes the proposition, and brings to light the very wrong which the Advisory Committee thought it had provided against.

C. The Contention That Petitioner Consented to a Deprivation of Procedural Due Process is Wholly Without Merit and not Supported by the Record or by the Opinion of the Court of Appeals.

To escape fatal consequences following denial to petitioner of procedural due process, respondents attempt to fortify a certain mistaken contention of the District Judge in regard to a stipulation allegedly made by petitioner while defending the case in the trial court. This action of the District Judge occurred on the third day of trial when it became quite evident to witnesses, attaches and spectators that petitioner was suffering from a deprivation of procedural privileges (R. 144, 145). A brief review of the transcript of record on certiorari will show beyond doubt that petitioner refused to accept this contention, advising the court that it preferred to rely upon the reporter's transcript of testimony (R. 145). In this connection it is interesting to note that respondents refuse to contest the basic point of procedural due process fully developed in Brief In Support. See authorities at pp. 24, et seq. Rather, respondents prefer to seek support for the mistaken views of the District Judge. Respondents' methods in support of this alleged stipulation seem to expose its entire lack of merit. By purposeful deletion, together with the specific disengagements of the text of the colloquy, respondents have placed in their Statement of the Case what

to them purports to be by a stipulation. It is then argued that petitioner consented to be bound by the District Judge's action limiting petitioner's privilege of a full defense. Without these deletions, respondents made the same contention before the Court of Appeals. It was wholly rejected. Respondents before this Court present the same contention, but find it necessary to purposely delete portions of the text. At Page 7, Respondents' Brief, the following excerpt appears:

> The Court: That is just where Mr. Fischer stands. He says you must proceed in the first instance by showing a change since the judgment of June 14, 1944.
> Mr. Keane: I agree with that. I have no contest with that point.

The full text of the colloquy which, parenthetically, was a mere oral argument about the applicability of a rule in *Hurd* v. *Albert*, 214 Cal. 15, 3 P (2) 545, and one of several legal propositions considered by the court*, is as follows:

> Mr. Keane: I agree with that. I have no contest with that point. That is why Justice Schweinhaut said, "There are no findings." *Therefore, it cannot be on that basis.* We do not know what they were at that time. In the very language of Justice Schweinhaut, we do not know." (Italics supplied)

Within the full colloquy which is clearly incapable of conversion, by speciosity, or otherwise, petitioner's counsel strongly urged that res judicata was not to be applied in any degree because the former action was entirely different from the pending proceeding (R. 60). In fact, petitioner's counsel actually read to the court the very same

* Respondents competely overlook the distinction between a mere argument upon a legal point and a formal stipulation. Rule 17, Rules of the United States District Court for the District of Columbia provides: "A stipulation in an action will not be considered by the court unless the same be in a writing signed by the party to be bound thereby or his attorney; or made before the court or a master at a hearing stenographically reported. . .".

decision upon which it here relies on certiorari, namely, *Fidelity Title and Trust Company* v. *Lomos and Nettleton Company*, —— Conn. ——, 5A (2) 700 (R. 60). It is useless for respondents to argue that petitioner waived this contention. No advocate could have urged it more emphatically. Respondent's contention seems more faulty when it clearly appears that six weeks previously petitioner's counsel filed a thirty page brief with the pre-trial judge in support of its definite contention. The pre-trial judge ruled with the petitioner, filing an order completely rejecting any application of res judicata (R. 37).

Petitioner frankly admits that at trial commencement it did enter into a limited stipulation, but to the following extent (R. 61):

> The Court: Now, if I understand your position, you admit the existence of the covenant?
> Mr. Keane: I admit it, yes, sir.
> The Court: If I understand you, you would agree that the plaintiffs should have the relief here asked unless you are able to establish the defense?
> Mr. Keane: Yes, sir.
> The Court: Which you have?
> Mr. Keane: I will assume the entire burden of proceeding on the basis that it would create an equitable thought in your Honor's mind.

The above merely confirmed the stipulation made in the pre-trial order (R. 40). It was to relieve the respondents, as plaintiffs, from the arduous task of obtaining proofs of these 40 year old covenants. It did not extend any further, nor did it constitute a waiver by petitioner of proofs; but, on the contrary, expressly reserved to the petitioner a full equitable defense*. It is unfortunate that the District

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* The record is clear that subsequent to the colloquy mentioned in respondent's brief, counsel for respondent, Mr. Fischer, realized that he had failed to prevail—at least for the moment. At this point, we find Mr. Fischer insisting (R. 61) upon the right to certain proofs in chief before the petitioner undertook the burden of proceedings. There is little doubt as to Mr. Fischer's interpreta-

Judge, because of preoccupation with the manifold duties of a presiding arbiter in a lengthy and detailed proceeding, became unmindful of the true extent of petitioner's earlier stipulation. It would have been far better to have left the controversy in its original position; i.e., a direct application by the District Judge of res judicata with petitioner's direct objection left un-smirched rather than, without due reflection upon its true existence, to have injected a collateral matter to confuse petitioner's statutory privilege of appellate review. Thusly injected, it truly tempts an aggressive adversary to interfuse texture in abortive attempts to give it some semblance of reality.

CONCLUSION.

The brief filed herein by the respondents fails to adequately answer petitioner's contention that the Court of Appeals' majority opinion improperly applied res judicata to deny the petitioner the privilege of defending its property rights. Certiorari should be granted and the Court of Appeals ordered to remand the case for further proceedings.

Respectfully Submitted,

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tion of the prior colloquy which he now attempts to endow with a different meaning. On Page 9, Brief of Respondents In Opposition, counsel for the respondents even find it necessary to resort to the phrase "All right, Your Honor", to reach their desired objective. This, of course, was but a courteous reply to a very gentle and courteous jurist. Surely, courtesy should not be turned into a weapon. Petitioner theretofore had amply fulfilled the requirements of Rule 46, F. R. C. P. by informing the District Judge of its contention. There was no need to continue the debate.